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IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 73

NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

ANTONIA AMBROSE, Administratrix of the Estate of John Ambrose, deceased,
Respondent.

BRIEF IN OPPOSITION OF PETITION FOR WRIT OF CERTIORARI.

ALEXANDER SIMPSON,
Counsel for Respondent.

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IN THE

Supreme Court of the United States

October Term, 1928.

No. 863.

NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,
vs.
ANTONIA AMBROSE, Administratrix of the Estate of JOHN AMBROSE, SR., deceased,
Respondent.

BRIEF OF RESPONDENT.

Statement of Facts.

This is a reply to an application for a certiorari to review the judgment obtained by the respondent in the Hudson County Circuit Court of New Jersey. The judgment has been passed upon and affirmed by the Court of Errors and Appeals. The facts are:

John Ambrose on the 16th day of July, 1927, was a general utility man on the floor of the New York Central Railroad grain elevator at Weehawken, New Jersey, used for interstate trans-ship-

ment of grain. He died on Saturday, the Tuesday preceding which cyanide gas had been put in one of the grain bins in the elevator for the purpose of experiment. (Record pages for these facts are hereafter given.) He was last seen at 9 o'clock Saturday morning when he was sweeping the floor. The covers of the bin, the opening of which was on the floor he was working, were not sealed, at least as appears in the photographs in the record. A noise of a falling body was heard and he was found at the bottom of the bin. Death by cyanide poisoning was the physician's testimony. The fact of the presence of gas had not been communicated to him by his superintendent nor had he been warned of the danger of the gas. The only warning, if any was given, was that he was told to keep away from the bin, that is, not to go into the bin.

The statement of facts in the brief of the petitioner, page 5, bottom of page says:

> "Shanahan had no authority to permit the experiment (Record, page 35, line 25)."

The record page 24, line 19, is as follows:

> "Paul S. Shanahan, sworn for the plaintiff.
> Q. What is your occupation? A. Superintendent on grain elevator.
> Q. You were in complete charge of it? A. Yes, sir; of the elevator."

This shows that he had complete charge of the building, permitted the use of the elevator, without notice to decedent then at work, at the place where he had hired himself out as a work-

man in the grain elevator, to be changed into a place where dangerous chemical experiments were being conducted.

POINT I.

The proof showed that the gas used was cyanide, a poisonous gas. (Testimony of Dr Sachs, Record, page 41, line 35.) The gas was being used in experiments to exterminate vermin in wheat. (Record pages 24, 25.) The gas being used was cyanide. (Record, page 25, line 35.) The gas was put in the wheat, which was in bags. (Record page 26, line 12.)

The manager of the grain elevator floor, Dillworth, said that when he looked over the bin into which the man now deceased had fallen, he smelled gas. (Record, page 67, line 30.) It is, of course, admitted that negligence must be shown under the Federal Employers Liability Act but there was evidence from which the jury could find negligence; if there was proof that the master had caused cyanide gas to be in the grain warehouse, no matter what part of the grain warehouse, if it could escape and injure an employee, this made the warehouse an unsafe place in which the servant worked.

There is no proof that the so-called covers were air-tight and there was evidence in the case from which the jury could find that they were not. (See photographs offered in evidence.) Ambrose's work was that of general utility man on the floor; sweeper of floor; attending to the bins; and the

jury could very well find that he was within the scope of his employment while sweeping the floor during work that it might be necessary to adjust the covers of the bin and in so doing, there was ample evidence to justify an inference that he had been overcome by this gas and fallen down the bin.

It is true there was no eye witness to the accident, but there was circumstantial evidence. The poisonous gas in the warehouse; death of Ambrose by gas poison; cases found in Corpus Juris title, Death Volume 17, P. 1308-9-10 are authority for the proposition that there was evidence enough to go to the jury.

The case cited in brief of petitioner, Chicago, Milwaukee and St. Paul v. Coogan 271 U. S. 472 is distinguishable. In the Coogan case, there was no direct evidence that decedent's foot was caught in a pipe; all the evidence there was that the body of deceased was found near the west end of the second car from the caboose and he was lying parallel with the track. There were indications that he had been between the rails of the track but no evidence as to the proximate cause of death. In our case we have the presence of cyanide gas and death by cyanide poisoning. There is no speculation necessary.

The evidence in this case is not direct but circumstantial. The gas; the death by gas; the finding of the body; the condition of the bin; the admitted presence of a poisonous gas. There could

be no more evidence except the testimony of the man killed, as he was alone at the time of the accident. In short, the negligence relied on is that the decedent was killed by this colorless, odorless and deadly gas; this was a demonstration and the master failed to use reasonable care to provide a safe place for the servant.

The New Jersey Supreme Court said in Manziano vs. P. S., 92 N. J. L. 326:

> "In such an environment the natural presumption is that the deceased met death while engaged in his occupation. There was no evidence that between four and six o'clock in the morning he voluntarily entered the trench for any purpose incompatible with his duty; nor was there evidence that he was *non compos* or abnormal and unable to appreciate and realize the necessary incidents of the danger which surrounded him, and to guard against the manifest and inherent perils of which he was enjoined to warn the public. In the absence of proof to that effect, the theory of suicide must be eliminated from the case, for the rule seems to be settled that where a person is found dead, the presumptions are that his death was natural or accidental, unless the evidence shows him to have been insane; that suicide will not be presumed, and that the fact of death in an unknown manner creates no such presumption (Germain vs. Brooklyn Life Insurance Co., 26 Hun, 604; 29 Cyc., 235, and cases cited).
>
> Illustrations of the application in this jurisdiction, of deductive reasoning from circumstantial testimony, are presented in DeFazio vs. Goldschmidt Company, 87 N. J. L., 317; Bryant vs. Fissell, 84 *Id.*, 72; Muzik vs. Erie Railroad Co., 85 *Id.*, 129.

> In two of the cases cited there was proof only of the death and of the dangerous environment of the deceased, which furnished presumptive or circumstantial testimony of the manner of death, by a logical process of rational induction, based upon human experience, from which the reasonable inference of the existence of the statutory requirements was deducible, *i. e.*, that death arose out of and in the course of the employment."

Also see the case of U. S. Fidelity & Guarantee Co., vs. Ind. Comm., Colo., 230 Pac., 634. (1924.) See also Western and Atlantic R. R. Co. v. Nora E. Hughes, 73 Lawyers Edition, U. S. Supreme Court, #7, March 1st, 1929, Advanced Sheets, page 268, which holds "Creditability of witness and weight of facts were obviously a matter for the jury."

The witness, Fitzpatrick, who was on the floor doing the same kind of work had lost his sense of smell (Record, page 22). Decedent swept the floor and moved the trolleys and generally helped around. (Record p. 22, lines 20-30.) The witness, Fitzpatrick, does not testify the covers were on the bin (Record page 24). The witness, Fitzpatrick, did not hear Mr. Dillworth say anything to decedent about keeping away from the bin. (Record p. 23, line 18.)

The use of the elevator for the purpose of experimenting with this deadly gas was with the knowledge and consent of the defendant. (Record p. 25.) Singer Mfg. Co. v. Rahn, 132 U. S., 518; New Orleans R. R. v. Henning, 15 Wall, 649. The experimenting consisted in having an apparatus

distribute the cyanide through the grain and a certain specific flow and was completed on Tuesday preceding the Saturday of the accident.

The gas was to stay in the bin 72 hours. (Record page 26, line 15). The bin was not sealed at the top in which the gas was being used. (Record p. 27, line 16.) The gas was formed by the air and powder coming in contact. (Record p. 27, lines 30-40.)

There is no proof that the dead man went into the bin. In adjusting the covers, he could have been so overcome by gas as to fall into the bin. No instructions were given by Shanahan to the men as to the danger of the gas. He contented himself with telling Mr. Dillworth, the floor foreman.

On Tuesday, both Dillworth and Ambrose took the covers off and looked into the bin, evidently under Dillworth's orders, who was the foreman. These men were not told that the gas in the bin was fatal. (Record p. 35, line 10.) Petitioner did consent to the experiment through the man in charge of the elevator.

> Singer Co. v. Rahn, 132 U. S., p. 518;
> New Orleans R. R. v. Henning, 15 Wall, 649.

The only testimony to this effect is the self-serving testimony of Shanahan, (Record p. 35, line 23) but the fact remains that Shanahan was

the superintendent and in complete charge of the grain elevator. On page 24 of the Record, he is asked:

> Q. What is your occupation? 'A. Superintendent on grain elevator.
> Q. You were in complete charge of it? A. Yes, sir; of the elevator.

So, it is idle to say he did not have the authority to allow the presence of gas in the structure. Petitioner indicates, but does not state, that the cause of decedent's death was his own negligence. To support this argument they would have to prove that decedent put the gas in the warehouse because it was the presence of the gas that was the negligence.

POINT II.

Decedent was in a grain warehouse used by the defendant as a common carrier by railroad as means of shipping grain received from without New Jersey and shipping it outside of New Jersey by boats to New York. It was therefore an instrument of Interstate Commerce. See the following cases:

> Illanardo v. Erie, 103 N. J. L. 4; affirmed in 103 N. J. L. 698;
> Grybowski v. Erie, 89 N. J. L. 361;
> Lemke v. Farmers Grain Co., 258 U. S. page 50.

The jury, from the evidence, could find that the man, when killed, was sweeping the floor of the

grain warehouse, where it might be necessary for him to adjust the cover of the bin, or where gas was escaping under the cover and he was trying to prevent it, and whether he had removed the cover, were all inferences that the jury could have drawn. It is not a question of a servant waiting to be directed as in the case of Erie R. R. v. Welch, 242 U. S. 303. Here he was actually at work in the warehouse when he was killed. He had not ended his employment because he was killed early in the morning. There were weighers on the floor above who sounded a bell for the decedent to notify them whether grain was to go into the chutes. The defendant accounted for one weigher but not for the other, and it was not within the realm of speculation for the jury to say that there was a sounding of bells for the man, now dead, to get the chute ready, for two of the covers were off after the accident. There were four holes to be covered. You have to take the spout hole cover off to put the spout on. (Record page 50, line 30.)

One of the weighers, John T. Brewer, describes the course of business. (Record page 52). Any one of the weighers would call the decedent. (Record, page 67.) Dillworth was affected by gas. (Record, page 68.)

The witness, Dillworth, who was the foreman of decedent had not seen him after 9 o'clock in the morning. (Record, page 68, line 33.) He was killed between quarter of ten and ten o'clock.

POINT III.

Contributory negligence is not a defense in actions under the Federal Employers Liability Act. It may reduce the damages, and in this case it probably did, for the recovery was very small, $6,-300.00. That question was submitted to the jury by the charge of the Court. (Record p. 77, lines 20-37.)

In the Krysiak v. P. R. R. case, 270 Federal, 758, cited by petitioner, the man injured had finished his work and lost the status of an employee in Interstate Commerce. The decedent here was actively at work in his place of employment when he was killed. To say that he voluntarily removed the covers for a purpose other than that of his employment is to go into the realm of speculation.

Risk.

In the brief of the petitioner, no mention is made of risk, but it is plain that risk of death by poison by an invisible gas which has no odor and is only detected by its affects, which are serious poisoning or death, is not one of the risks intended to the business of shipping grain on a grain elevator. The only risks are those incidental to the moving of grain. It was not an obvious risk because the decedent was an ordinary laboring man and had no means of knowing what the gas was and what it would do. The mere fact that he had been told to keep away from the bin, if he was

told, and that the creditability of the witness who so testified, was for the jury, as the only person to contradict him was dead and he had not apprised him of the danger. See Clark v. Public Service Co., 86 N. J. L. 144 Pt. 4 of syllabus. is not conclusive

Exhibit P. 2 shows the inside of the bin looking down. Exhibit P. 3 shows the floor on which the decedent was working. These were offered in evidence and could have been taken by the jury to show that the holes were not air-tight. These were shown to the jury and would warrant the jury to find it as a fact that the holes and the covers showed that the covers did not make it impossible for gas to escape.

The Hughes case found in 73 U. S. Law Ed. #7 Advanced Sheets, March 1st, 1929, page 268, cited by the petitioner, is relied on by the respondent. It cannot be argued that the death of Ambrose was due to his failure to obey orders as in the case of Unandilla Rwy. v. Caldine, Advanced Sheets, December 15th, 1928, page 102.

It is respectfully submitted that the petition be dismissed.

ALEXANDER SIMPSON,
Of Counsel with Respondent.